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IN THE

Supreme Court of the United States

October Term, 1964

No. 503

DELAWARE SPORTS SERVICE, A PARTNERSHIP,
Petitioner,

v.

THE DIAMOND STATE TELEPHONE COMPANY, A CORPORATION OF THE STATE OF DELAWARE,
AND
THE STATE OF DELAWARE,
Respondents.

BRIEF OF THE STATE OF DELAWARE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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DELAWARE SPORTS SERVICE, A PARTNERSHIP,
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THE DIAMOND STATE TELEPHONE COMPANY, A CORPORATION OF THE STATE OF DELAWARE,

and

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Respondents.

BRIEF OF THE STATE OF DELAWARE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

STATUTES INVOLVED.

Section 671 of Title 11 of the Delaware Code provides:

§ 671. Definitions

"As used in sections 671-677 of this title, unless the context indicates a different meaning—

"Call service" means the furnishing of information upon request therefor or by prearrangement over general telegraphic, telephonic or teletypewriter exchange or toll service;

"Dissemination" means the act of transmitting, distributing, advising, spreading, communicating, conveying or making known;

"Person" or "whoever" means a corporation (including a public utility), partnership or association, as well as a natural person;

"Private wire" means any and all service equipment, facilities, conduits, poles, wires, circuits, systems by means of which service is furnished for communication purposes, either through the medium of telephone, telegraph, Morse, teletypewriter, loudspeaker or any other means, or by which the voice or electrical impulses are sent over a wire, and which services are contracted for or leased for service between two or more points specifically designated, and are not connected to or available for general telegraphic, telephonic or teletypewriter exchange or toll service, and includes such services known as "special contract leased wire service", "leased line", "private line", "private system", "Morse line", "private wire" but does not include the usual and customary telephone or teletypewriter service by which the subscriber may be connected at each separate call to any other telephone or teletypewriter designed by him only through the general telephone or teletypewriter exchange system or toll service;

"Public utility" means a person, partnership, association or corporation, owning or operating in this State equipment or facilities for conveying or transmitting messages or communications by telephone or telegraph to the public for compensation."

Section 674 of Title 11 of the Delaware Code provides:

§ 674. Business of disseminating gambling information; receiving gambling information

"No person shall engage in the business of, or receive compensation in any form or measure for, the dissemination of or receive information in furtherance

of gambling or for gambling purposes by means of private wire or wires, or by means of a call service."

Section 675 of Title 11 of the Delaware Code provides:

§ 675. Revocation of service contracts; exemption from liability

"Any public utility shall, when it is advised in writing by any law enforcement agency acting within its jurisdiction that any service furnished by it is being used in the dissemination of information in furtherance of gambling, or for gambling purposes, revoke its contract to furnish any such service.

No public utility shall be liable at law or in equity for any damages or penalties, either civil or criminal, for such revocation of contract."

Section 677 of Title 11 of the Delaware Code provides:

§ 677. Sections 671-676 as exercise of police power; construction

"Sections 671-676 of this title shall be deemed an exercise of the police power of this State for the protection of the public welfare, health, peace, safety and morals of the people of this State, and all of the provisions of sections 671-676 of this title shall be liberally construed for the accomplishment of this purpose."

STATEMENT OF THE CASE

Nature and Stage of the Proceedings

This matter is before this Court on Petitioner's Petition for a Writ of Certiorari to review the decision of July 9, 1964, of the Supreme Court of the State of Delaware.

Prior actions in this case have been in the Public Service Commission and the courts of the State of Delaware. On July 9, 1964, the Supreme Court of Delaware,

on an appeal from the Order (R. Super. Ct.-15),[1] dated October 9, 1963, of the Superior Court of Delaware, affirmed *per curiam* (R. Sup. Ct.-7)[1] the opinion of the Superior Court. The Supreme Court Mandate of July 22, 1964 (R. Sup. Ct.-9), affirmed the Order of the Superior Court.

The Order of the Superior Court affirmed the Order (R. Com., D-23)[1] of the Public Service Commission of Delaware, denied re-argument, and permitted the Defendant, Diamond State Telephone Company, to discontinue its service to Plaintiff, Delaware Sports Service. A stay (R. Super. Ct.-16) of the Order of the Superior Court was granted pending the decision on appeal to the Supreme Court. The Order of the Superior Court was based on its opinions of August 6, 1963 (R. Super. Ct.-10) and October 7, 1963 (R. Super. Ct.-14), which were the result of the pleadings, briefs, and oral arguments of counsel before that Court.

Petitioner had previously appealed to the Superior Court from the order (R. Com., D-23) of the Public Service Commission of Delaware, dated October 10, 1962, denying a petition (R. Com., D-2) filed in that Commission by Petitioner. This petition had sought relief from the proposed discontinuance of Petitioner's telephone service by the Diamond State Telephone Company. The order of the

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1. References to docket entries in the proceeding before the Supreme Court of the State of Delaware will be as follows: "R. Sup. Ct.- ___".

References to docket entries in the proceeding before the Superior Court of the State of Delaware will be as follows: "R. Super. Ct.- ___".

References to the record of the Public Service Commission will be as follows: Docket entries will be designated "R. Com., D-1," etc.; Exhibits of Intervenor, State of Delaware, will be designated "R. Com., IX-1," etc.; Exhibits of Respondent, Diamond State Telephone Company, "R. Com., RX-1," etc.; Exhibits of Petitioner, "R. Com., PX-1," etc.; Exhibits of the Commission, "R. Com., CX-1," etc.; references to pages in the transcript of the Hearing before the Public Service Commission will be designated "R. Com., H-1," etc.

References to material included in the Appendix to the Petitioner will be as follows: "P. App. ___".

Commission was based on the findings and opinion of the Commission dated September 12, 1962 (R. Com., D-19) and the opinion on reargument dated October 3, 1962 (R. Com D-22). The findings, opinion and order were the result of a four-day hearing consisting of approximately 700 pages of testimony (R. Com., D-25-27; H-1-699), some 45 exhibits (R. Com., D-28-31; IX 1-26; PX 1-14; RX 1-2; CX 1-3), the pleadings (R. Com., D-2, 4, 5) stipulations (R. Com., D-6, D-14) and briefs of counsel (R. Com., D-15-18).

Following the Mandate of the Supreme Court, the Attorney General notified the Telephone Company on August 7, 1964, of the Mandate and requested that it discontinue its service to Petitioner after 10 days therefrom unless Petitioner initiated further court remedies. Petitioner filed a Motion for a Temporary Restraining Order in the United States District Court for the District of Delaware on August 14, 1964. This Motion was denied. Petitioner then filed a Motion for a Preliminary Injunction together with his Complaint in the District Court on August 20, 1964; the State filed a Motion to Intervene; and a Brief schedule was set. The State of Delaware, Intervenor previously, was served with the Motion and Complaint and is concurrently appearing as Intervenor in the District Court through the Attorney General, together with the Diamond State Telephone Company as Defendant, to support the decisions and orders of the Delaware State Courts. Simultaneously with his action in the District Court, Petitioner seeks a writ of certiorari in this Court. The State of Delaware and Diamond State Telephone Company appear here as Respondents. This is the brief of the State of Delaware.

The State of Delaware does not believe that there is any value in merely replying sentence-by-sentence to Petitioner's contentions.[2] Instead, there is a need for a complete statement of facts to explain the history of the litigation, to cover the facts which are in the entire record, and to discuss the totality of the findings and opinions of the

2. References to Petitioner's Brief will be designated (PB- ___).

Commission, the Superior Court, and the Supreme Court. We rely, therefore, on our own Statement of the Case and our Argument.

History of the Litigation

The volume of "flash" race results provided by Delaware Sports Service has helped to nourish and nurture the malignant growth of organized bookmaking in a large part of the entire country. Telephone service is the life blood of the enterprise. Removal of this service would be a serious blow to crime. This is why we have moved from the Superior Court of Delaware, to the Court of Chancery, to the Public Service Commission, back again to the Superior Court, to the Delaware Supreme Court, to the United States District Court, and now to the United States Supreme Court, with side trips to the District of Columbia Public Utilities Commission and the McClellan Senate Investigations subcommittee's hearings on gambling and organized crime.

The findings and opinions of the Delaware Public Service Commission and the Superior Court support the irresistible conclusion demonstrated in prior proceedings and articulated by Judge Carey in an early scene from this drama, *Tollin v. State*, 7 Terry 120, 78 A. 2d 810 (Gen. Sess. 1951):

> "This information was obviously of great help to those who receive or place bets, since it included not only racing results but also last-minute details prior to a race. Moreover, *I am not so naive as to believe that Tollin did not realize the news was being used by others to facilitate gambling.* (Emphasis supplied.)

1. Early Prosecution

Litigation with the Tollins dates back to 1950 when Joseph Tollin, deceased father of Albert Tollin, was charged with violation of Section 4063, Rev. Code of 1935, now Section 669 of Title 11 *Del. Code*. At that time, Joseph Tollin headed up Delaware Wired Music Company, Inc., which

maintained equipment at 839 Tatnall Street, Wilmington, to receive and disseminate "sporting news". On appeal, the court directed a verdict of acquittal because it found that the operation of a business the same as that involved in the case at bar did not violate *that particular statute. Tollin v. State,* 7 Terry 120, 78 A. 2d 819 (Gen. Sess. 1951).

2. 1952 Legislation

Subsequent to the above case, in an effort to close the legislative gap demonstrated by that decision, the General Assembly, on January 28, 1952, enacted 48 *Del. Laws,* Chap. 493, which became 11 *Del. C.* §§ 671-677. The pertinent sections involved in this case are Sections 671, 674, 675, and 677, which are set forth above under Statutes Involved.

3. Diamond State Telephone Co. Tariff

Diamond State Telephone Company filed a tariff with the Delaware Public Service Commission which provides as follows:

> 20. *Use of Service for Unlawful Purposes*
>
> "Service is furnished subject to the condition that it will not be used for an unlawful purpose. Service will not be furnished if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law, or if the Telephone Company receives other evidence that such service is being or will be so used."

4. Chancery Court Action

Shortly thereafter, on October 13, 1959, as a result of an investigation by the Delaware Attorney General's office in cooperation with law enforcement officers of various other states, the Attorney General sent the Diamond State Telephone Company a letter requesting it to discontinue its service to Delaware Sports Service unless Sports Service elected to test the matter in court. After Diamond State notified Delaware Sports Service, it filed a complaint on October 22, 1959, in the Court of Chancery of the State of

Delaware attacking the validity of Title 11 *Del. C.* § 675 and seeking injunctive relief.

On cross-motions for summary judgment, Vice Chancellor Marvel enjoined the Telephone Company from discontinuing service to Sports Service prior to a hearing before the Public Service Commission. *Tollin v. Diamond State Telephone Co.*, 39 Del. Ch. 350, 164 A. 2d 257 (Ct. of Ch. 1960).

This opinion was based solely on the pre-trial motions, without any evidence. The Vice Chancellor's decision was directed to the absence of a hearing provision in 11 *Del. C.* § 675, stating that "Plaintiffs' motion for summary judgment will be granted to the extent of enjoining the Defendant, Diamond State Telephone, from terminating Plaintiffs' present telephone service prior to a hearing on the use to which Plaintiffs put such service."

5. Public Service Commission Hearing, Findings, and Opinion

Subsequently, a further notice was given to the Telephone Company by the Attorney General and, in turn, on November 28, 1960, to Sports Service by the Telephone Company. This action precipitated the filing of a petition by Sports Service in the Public Service Commission (R. Com., D-2). The State of Delaware, through the Attorney General, intervened in this proceeding with the consent of petitioner and respondent (R. Com., D-5). The Commission first made a decision on December 14, 1961 (R. Com., D-12), that it had jurisdiction of the petition even if all calls received by Sports Service came from outside the State of Delaware.[3]

---

3. The premise of the alleged exclusive interstate nature of petitioner's business was not conceded by either the Attorney General or the Telephone Company and later refuted by evidence before the Commission (R. Com., H-236, 252, 255). It was also shown at the hearing that Western Union money orders, paying in advance for service, might be sent to Sports Service from outside the State by persons who might then call Sports Service from within the State to obtain racing results (R. Com., H-391, 683). Thus, this issue should be moot. Petitioner is contesting, however, the jurisdiction of the Public Service Commission in his Motion for a Preliminary Injunction before the U. S. District Court for the District of Delaware.

Thereafter, an extensive hearing before the full Commission was held for four days, March 12-15, 1962. In addition to a considerable amount of testimony and exhibits, the Commission, on its own motion and with complete agreement by all parties, visited Sports Service at its present location at 601 Tatnall Street, Wilmington, Delaware, to get a firsthand view of the operation.

On September 12, 1962, the Public Service Commission filed its Findings and Opinion (R. Com., D-19) denying the relief prayed for in the petition of Delaware Sports Service, thus clearing the way for the removal of the telephones. After denial (R. Com., D-22) of Delaware Sports Service's petition for rehearing (R. Com., D-20), the Commission entered the order (R. Com., D-23) from which Delaware Sports Service took an appeal.

We will analyze the findings and opinion of the Commission, giving references to the page numbers thereof appearing in R. Com., D-19.

(a) *Burden of Proof.* The Attorney General and Diamond State had contended that petitioner had the burden of proof; however, the Attorney General had determined to go forward with his evidence solely for the convenience of moving the hearings forward. The Commission ruled that the Attorney General's position was "well founded" (R. Com., D-19, pp. 3-4; P. App. 20a).

(b) *Evidence* The Commission reviewed the testimony of several of the witnesses (R. Com., D-19, pp. 5-10; P. App. 21a-25a) which will be reviewed in detail in the next section of this Statement of the Case. The Commission discussed the question of admissibility of certain of this testimony (*e.g.*, ruled in favor of admissibility of statements of Joseph Tollin, deceased, and ruled against admissibility of certain correspondence between State Detective Wassmer and various police departments). With respect to the Commission's utilization of evidence placed before it, the Commission determined to disregard certain

evidence out of fairness to petitioner, notwithstanding the provision of 26 *Del. C.* § 183 that the Commission "shall not be bound by the technical rules of evidence" (R. Com., D-19, pp. 9-11; P. App. 24a-25a).

The Commission reviewed the evidence offered by petitioner, including the testimony of Albert Tollin (R. Com., D-19, pp. 11-15; P. App. 25a-28a). There appears to be no controversy that Delaware Sports Service has persons working at or near various racetracks around the country, that these persons determine, by the use of a pitch-catch signal system or related scheme, the unofficial winner of a given race and telephone that information to Wilmington instantaneously. Customers of Delaware Sports Service can find out this information within 20-25 seconds after the race is over by sending a Western Union money order in advance and by thereafter calling Delaware Sports Service and receiving the name or number of the winner immediately. The question of the identity and occupation of his customers and the use of the information was the crucial inquiry. Although the Commission found that Joseph Tollin had admitted in a statement co-signed by Albert Tollin, and had expanded on this admission before the District of Columbia Public Utilities Commission that "our services have practically no value except to bookmakers and professional bettors" (R. Com., D-19, p. 8; P. App. 23a). Albert Tollin now disclaims this knowledge (R. Com., D-19, p. 14; P. App. 28a).

In addition, the members of the Commission visited the premises. Their findings, which are not elaborated elsewhere in the record, are found at page 15 of their Opinion (R. Com., D-19, p. 15; P. App. 28a-29a).

(c) *Findings.* The Commission, after stating that it reviewed the entire record at some length but had touched upon what it referred to as only the "more salient aspects" of the record, concluded that the record showed that there existed in the minds of Diamond State and the State of Delaware "an honest belief, if not a confirmed conviction",

that Delaware Sports Service was using Diamond State's service to further illegal gambling. The Commission concluded that Delaware Sports Service had failed to rebut this conclusion, setting forth its reasons therefor in its Opinion dated September 12, 1962 (R. Com., D-19, pp. 15-20; P. App. 29a-32a).

After publication of the Findings and Opinion of the Commission, Delaware Sports Service filed a petition for rehearing (R. Com., D-20). The petition for rehearing was not timely, but the Commission elected, in an effort of abundant fairness to petitioner, to overlook the procedural irregularity and consider the petition on the merits. The Commission qualified one finding relating to a statement concerning Albert Tollin's knowledge of his previous testimony.[4] In all other aspects the findings and opinion were unchanged (R. Com., D-22).

6. Superior Court Appeal

On appeal to the Superior Court of the State of Delaware from the order of the Public Service Commission, Petitioner's arguments related to alleged denial of due process, whether or not the Commission conformed to 26 *Del. C.* §§ 183, 187, and attacks on the evidence. The Opinion of the Superior Court (R. Super. Ct.-10) is set forth in Petitioner's Appendix (P. App. 2a-17a).

Following this decision in the Superior Court, Petitioner then filed a motion for re-argument (R. Super. Ct.-11) which was duly answered by Respondents (R.

4. ". . . Tollin's lack of knowledge primarily concerned his father's sworn testimony before the District of Columbia Public Utilities Commission. Albert Tollin's testimony before us was at variance with that of his father and his own signed statement on one very important point—the use to which bookmakers put Petitioner's service. The disparity between the sworn testimony of those who knew most about Petitioner's service cannot be diminished and was not satisfactorily explained by Petitioner. Our over-all evaluation of Albert Tollin's testimony remains unchanged, however, and we find no basis for changing the result."

Super. Ct.-12, 13). Petitioner's stated grounds for seeking re-argument were not only without merit, it also sought to re-litigate and repeat arguments already thoroughly considered by the court. Petitioner's motion for re-argument was therefore denied in the court's opinion dated October 7, 1963 (R. Super. Ct.-14). The appeal to the Supreme Court followed the Superior Court's order (R. Super. Ct.-15) of October 9, 1963.

7. Supreme Court Appeal

The appeal of Sports Service to the Supreme Court of the State of Delaware involved virtually the same arguments as those used before the Superior Court. Following briefing and oral arguments, the Supreme Court affirmed *per curiam* on July 9, 1964, the opinion of the Superior Court (R. Sup. Ct.-7). A Motion for Reargument was denied (R. Sup. Ct.-9). The Supreme Court then issued its Mandate of July 22, 1964, whereby the Order of the Superior Court was affirmed (R. Sup. Ct.-9).

8. Motion for Preliminary Injunction in United States District Court

On August 20, 1964, Delaware Sports Service filed a Motion in the United States District Court for the District of Delaware for a Preliminary Injunction. This Motion followed one filed on August 14, 1964, for a Temporary Restraining Order which had been denied by the District Court.

Analysis of Facts in Record Below

1. Nature and History of Plaintiff's "Business"

In the early days of their business, the Tollins received horse racing information from Continental Press Service, a service subsequently put out of business by the Kefauver Committee (R. Com., H-557).[5] A great deal of

5. See also *McBride v. Western Union Telegraph Co.*, 77 P. U. R. (NS) 65, 171 F. 2d 1 (9th Cir. 1948).

information about each race had been disseminated by the Tollins, as the court found in *Tollin v. State, supra.* Upon discontinuance of major sources of track information, Joseph Tollin set up his own system for rapidly transmitting race results from inside the track to his racing news headquarters in Wilmington. This system consisted of having a "pitcher" inside the track give wigwag signals or other pre-arranged signals to a "catcher" just outside the track who relayed the information to Sports Service in Wilmington where it in turn was distributed to various customers throughout the country (R. Com., H-9, 57, 60-63; JTDC-243-46).[6] See also *People v. Pollack,* 204 Misc. 64, 120 N. Y. S. 2d 363, 364-365 (1953).

Subsequent to the passage of the present statute in 1952 (particularly Section 674) prohibiting dissemination of horse-racing information for gambling purposes or in furtherance of gambling, the Tollins changed their mode of operation and tailored the kind of racing information flashed to customers to include only the unofficial winner of a given race (R. Com., H-526, 592; JTDC-248, 264). This information is the key information to off-track bettors and bookmakers for the following reasons: (a) the unofficial winner is almost always the final official winner (R. Com., H-132, 212); (b) the service is so rapid (varying from instantly to no more than a minute) (JTDC-249; R. Com., H-632). In fact, the service is so fast that a customer, by holding a telephone line to Sports Service from just before the time a race should start can establish the times of actual race start and finish with the

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6. In Florida, such methods for obtaining and distributing horse racing information prior to 30 minutes from the end of the race, with exceptions not pertinent here, is a violation of Florida laws (R. Com., IX-8; H-87-92, 110-111, 115). "JTDC" will hereafter refer to the testimony of Joseph Tollin before the District of Columbia Public Utilities Commission on April 23, 1958, made a part of this record by Exhibit "C" to Stipulation of August 10, 1961 (R. Com., D-6). The page numbers refer to that transcript.

accuracy needed by a bookmaker to prevent being past-posted or to engage in past-posting illegal off-track bettors (R. Com., H-608; PX-3, p. 306). Since there are usually fixed intervals between races, e.g., 30 minutes, knowledge of the actual time of the first race allows the customer accurately to calculate the times of subsequent races that day (JTDC-249-50); (c) having up-to-the-minute information on winners helps the bookmaker in making decisions on "lay-offs" on subsequent races; (d) it stimulates further betting by informing the bookmaker's customer if he has won, thereby allowing him to place further bets the same day (R. Com., H-130-33, 182-184).

An example of the attempt by Delaware Sports Service to tailor its operations to avoid the present statute is the unexplained contention of Albert Tollin that telephone calls from within the State of Delaware are not accepted by Sports Service.[7]

The Tollins have always conceded that speed in transmitting results is their stock-in-trade and that they would be out of business without it (R. Com., H-581, 619, 622-23, 627). Joseph Tollin readily admitted that their service is faster by some 12-40 minutes than the other services, including Armstrong and Triangle, corroborating the testimony of other witnesses (R. Com., H-376, 515-518, 616; JTDC-249, 256). Even Albert Tollin so concedes (R. Com., PX-3, p. 341). It is only when some feature race is radioed or televised directly, either as a public service of the network or for a paying advertiser, that Sports Service's timing is equalled or bettered, but these instances are infrequent.

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7. Compare Albert Tollin's inability to give a reason for not selling to Delaware customers (R. Com., H-666) with his unconvincing alleged method of distinguishing such calls by their degree of clarity (R. Com., H-682) and his admission that he did not know where the calls came from (R. Com., H-655).

2. Customers of Delaware Sports Service

The procedure for obtaining information from Sports Service is fixed and simple. A person using any name he chooses sends in to Sports Service a Western Union money order of $20 for one result, $30 for two results, $40 for three results, or $50 for four or five results (R. Com., H-603, 605). Later, allowing sufficient time, approximately 1½ hours (R. Com., H-622-23), for receipt of the money order, he calls in to Sports Service and receives the number of track results he has paid for from the track of his selection (R. Com., H-77-81). Fictitious names and addresses are commonly used by the subscribers, and the money order and calls for service may emanate from different locations (R. Com., H-88, 105, 110, 113; JTDC-246). While Albert Tollin maintains that Sports Service operators always admonish the callers that the information is not to be used illegally (R. Com., H-561), there is no way of checking on one already engaged in illegal betting.[8] If the payment is received in advance, the information is always given out (R. Com., H-603).

As a matter of fact, Albert Tollin claimed that he has never tried to find out who his customers are (R. Com., H-539). He conceded that the flash service was of value to bookmakers (R. Com., H-627-28) but that he has never tried to ascertain whether or not any of his customers are bookmakers. He has not even checked the names of customers (Mitchell Slifken, Santo Damiano, and Frank Sorrentino) who the McClellan Committee in their hearings of August 22-31, 1961, advised him are bookmakers (R. Com., H-564). He claimed not to know whether the names used by customers are fictitious (R. Com., H-562). With respect to the *one* customer whom he had *met,* he said he would not be surprised to learn that he was in the business of disseminating horse racing information (R.

8. See Commission's Findings, R. Com., D-19, p. 17.

Com., H-553, 575, 576, 619). He later testified that he sold results to Angelo Rossetti in Boston and also received horse racing information from him (R. Com., H-661, 681). Rossetti has a long criminal record including gambling offenses (R. Com., IX-15).

Albert Tollin purported to believe, moreover, that bookmakers would have little use for his services and that his customers were really touts, horse owners, horse trainers, or persons who send bets via others to the track (R. Com., H-549-52, 566-67). The alleged reason why these people pay for his expensive service rather than wait a half-hour and receive it free from regular press services is that they must relieve their extreme anxiety and cannot wait (R. Com., H-581-83). This contention is made even more amazing by the testimony of an accountant for the McClellan Committee that the average *annual* gross income of Sports Service for the years 1955 to 1960 was approximately $262,700 (R. Com., PX-3, p. 322). Albert Tollin was unable to name a single person in these categories who subscribed to his service (R. Com., H-566, 567, 569). In contradiction, Joseph Tollin freely conceded that none of these persons would have a use for the service (JTDC-249-51, R. Com., IX-14).

It is well to recognize at this point that Albert Tollin not only disclaimed knowledge of his customers but also disclaimed any expertise in the bookmaking business (R. Com., H-557). More importantly, he corroborated the testimony of others that his father, Joseph Tollin, was an *expert* on both horse racing and bookmaking (R. Com., H-381, 557-559). The only conclusion possible, therefore, from Albert's own testimony, is that greater weight is to be given the testimony of his father, Joseph, than his own with respect to the uses of the information disseminated by Sports Service.

3. Joint Statement of Joseph and Albert Tollin Dated April 14, 1958

Both Albert and Joseph Tollin signed, on April 14, 1958, a revealing statement (R. Com., IX-14) as to their business. This statement was witnessed by State Detective Walter J. Wassmer and Thomas LaVernia, an investigator for the Chesapeake and Potomac Telephone Company. The significant part of the statement reads:

> "Our business is to get flash results to our customers before the radio and newspaper announcements. We have to do this to survive. Our services have practically no value except to bookmakers and professional bettors."

Albert's later lame assertions that he did not want to upset his father (R. Com., H-558-59) and that he did not read the statement (R. Com., PX-3, p. 304) as excuses for his signing should be given little weight in the light of his foregoing admissions.

4. Joseph Tollin's Testimony Before District of Columbia Public Utilities Commission

Subsequently, on April 23, 1958, Joseph Tollin testified before the Public Utilities Commission of the District of Columbia, in connection with an application of a company named Sports News Service, Inc., for telephone service in Washington, and commented further on the need of bookmakers and professional bettors for his service (JTDC 249-50; emphasis supplied):

> "Q. Is there a need for that service?
>
> A. There is a need for that type of service, because so many different sections want to know the off time of that first or particular race so that they can then judge for the rest of the day what they are going to be able to do. They don't have to call back for the service no more. Laurel is going off at 1:30, which is

official time for it to go off, they know it goes off at 1:38, they know they have got five to eight minutes in each race that they can lag behind and still be in the clear.

Q. Why is that necessary, to know whether they are in the clear or not?

A. *Well, if they are interested in taking bets or making bets, it works both ways.*

Q. I wish you would explain to me, sir. Why is it so important to know what is the off time of the race?

A. Well, it is important to know that because those conditions can be—*you have more time to know how you are able to take a bet.* See, a lot of people come in late, and *a lot of people want to bet after they are over*, too, if you are foolish enough to take the bet.

Q. So people who are interested in taking bets want to get the fastest service available, is that right?

A. That's right.

Q. *For two reasons, to know how late to take a bet and also to keep somebody from betting on a race that's already been run.*

A. *That's right.*"

Joseph Tollin further freely testified (JTDC-256; emphasis supplied):

"Q. Is their service of any value to bookmakers?

A. Yes, sure. See, no service is just as valuable to bookmakers, because if he wanted to take his business up to one o'clock and stop, he can go to the next day and it's just as valuable to him; that's the end of it.

Q. *But your service is more valuable?*

A. *It's more valuable, because he can get a larger amount of business by being able to stay in business till two o'clock, three o'clock, and so on, to the end of the*——

Q. *The rest of the afternoon, hey?*

A. *Until the afternoon is over.*"

It is important to realize that Joseph Tollin was referring to the same kind of race result, i.e., the name and post number of the unofficial winner, as is disseminated by Sports Service today. Furthermore, the evidence is uncontroverted that Joseph Tollin was the organizer and guiding light of Sports Service until his death in 1960 and understood fully the uses being made of its service. It is submitted also that Albert Tollin's detachment from his customers and apparent lack of knowledge of their uses of his information are all part and parcel of the carefully contrived mode of operation tailored to minimize the risk of Sports Service being held in violation of our gambling laws.

5. Testimony of Law Enforcement Officials

At the expense of prolonging this Brief, the State feels it is advisable to place before the Court an analysis of the testimony of the law enforcement officials who testified. The purport of their testimony must be placed in its proper perspective because of the fact that Petitioner has quoted portions of this testimony out of context and otherwise unfairly presented this testimony in its Brief.

The witnesses called by Intervenor included highly placed law enforcement officers from several states, as well as a member of the Thoroughbred Racing Association Protective Bureau. These are some of the persons from outside Delaware who have participated in the effort to rid Delaware of this valuable aid to organized gambling.

It is important to reiterate at this point that the Delaware Public Service Commission based its decision on evidence of sound probative value. While the rules of the Commission allow it to admit hearsay and opinion (Rule 183), and a considerable amount of such evidence entered the record from both parties, the Commission distinguished such evidence so as to ground its decision on evidence following the technical rules. The following summary is, therefore, not a complete summary of all the evidence introduced, but some of the evidence having probative value supporting the findings of the Commission.

Former Delaware State Detective Walter J. Wassmer testified[9] as to the toll analyses he secured by use of an Attorney General's subpoena. These official records of the Telephone Company showed telephone calls between Sports Service and other telephone numbers in and out of the State. Law enforcement officials in the states involved were requested to determine whether or not the persons to whom these numbers were listed had criminal records and specifically gambling records. These toll analyses have been made periodically in Delaware (R. Com., H-273-75, 291, 309, 383-84, 407). Out-of-state law enforcement officers also subpoenaed records of Western Union to ascertain who was sending moneys to Sports Service. These officers also made toll analyses of calls to Sports Service from particular telephone numbers in their states (R. Com., H-19-26, 29, 55, 64, 67-76, 117, 124).

The Delaware investigation covered twenty-six states (R. Com., H-325-26). Due to the obvious limitations on funds, facilities, and personnel, representatives from all of these states were not brought to Wilmington to testify at the hearing before the Commission. Instead, Detective Wassmer testified at length on some of the states from which witnesses were not produced. His testimony is supported by official police records and communications from and to those states including the criminal records of some of the persons involved. Since many of these documents were prepared in the regular course of business, they are admissible under the formal rules of evidence. The states include Indiana, Illinois, Ohio, New Jersey, Pennsylvania, Massachusetts, and New York (R. Com., IX-4-7, 15, 16, 18, 20-25; R. Com., H-20-25, 277, 280-84, 294, 296-99, 311, 315-25, 360-62).

Detective Wassmer made personal visits to New Jersey, New York, Pennsylvania, and Washington, D. C.,

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9. Another aspect of Wassmer's testimony (i.e., the statement of Joseph and Albert Tollin, R. Com., IX-14) has been referred to previously.

to verify the information obtained from the local officers (R. Com., H-275, 291, 293). Furthermore, the record shows that the telephone toll analyses were made in a legal manner (R. Com., H-274) and were based on toll slips and Telephone Company records personally compiled by Wassmer (R. Com., H-309, 383-84, 407). There is no merit to the suggestion that this information was illegally obtained in violation of 11 *Del. C.* § 757 or otherwise. It was unnecessary to refer to telephone conversations to obtain the desired information, which was available from regularly kept records of the Telephone Company.

Another technique used by law enforcement officers was the use of mail surveys. From a 30-day survey beginning March 11, 1960, of Sports Service mail transmitted through the Wilmington Post Office, Detective Wassmer was able to identify only one actual person, Kenneth Hanna. Hanna had a criminal record which included arrest and conviction for gambling offenses (R. Com., H-364, 412-13).

Witnesses from the State of New York were Francis X. Smith, Chief of the Rackets Bureau of the District Attorney's Office of Queens County; Benjamin Kossoff, Queens County Detective; and Daniel D. Moynihan, Special Agent with the New York State Commission of Investigation.

Mr. Smith testified that he has been investigating the activities of Sports Service and its employees in New York since late 1952 (R. Com., H-8), when he met Ralph Atlas, alias Rudolph Atlas, Joseph Tollin's overseer of the pitcher-catcher teams (R. Com., Ex. C., p. 243). See *People v. Pollack*, 204 Misc. 64, 120 N. Y. S. 2d 363 (1953). Mr. Smith related how racing results were obtained from inside the track by Sports Service employees who immediately relayed the information by telephone to Wilmington (R. Com., H-9-10). Both Mr. Smith and Mr. Kossoff testified as to their continuing toll analyses of Western Union money orders sent to Sports Service (R. Com., H-29, 68-70); that over the years they had been able to find only one

actual person, Frank Acetta, who had sent such a telegram, because of the fictitious names and addresses used by the other subscribers. Frank Acetta has a bookmaking record which was duly authenticated and admitted into evidence (R. Com., IX-4; H-26-28, 40, 42, 48, 50).

In addition to testifying on toll analyses, Mr. Kossoff described how he sent $30 in May 1961 by money order to Sports Service and then called in the next day to Sports Service and obtained the winners of the first and second races at Aqueduct for that day (R. Com., H-67-68, 71-72).

Mr. Moynihan described in detail the use of toll analyses in planning and conducting large scale raids, which he supervised (R. Com., H-117), on gambling joints in the State of New York (R. Com., H-121-141; R. Com., IX-5). As to the value to bookmakers of "flash" results, Mr. Moynihan added to the other reasons given (past-posting, etc.) the value to the bookmaker in rapidly evaluating his position to determine whether he should "lay off" bets on subsequent races that day or take more of them himself (R. Com., H-124-25). When asked how he knew that horse racing information received from Sports Service was being used for bookmaking purposes, his *personal* knowledge was described in detail in the record (R. Com., H-118-119).

Martin Dardis, Investigator for the Attorney General of Florida, testified that he telephoned Albert Tollin early in January, 1962, to ascertain if he could obtain Florida track information after Hialeah opened (R. Com., H-88). On February 6, 1962, Dardis sent Sports Service a $30 money order under the name of "Pete Taylor" for results on Hialeah's fifth and sixth races on February 9 (R. Com., H-104-105). On February 9, 1962, Lt. Frank Kappel, Dade County Police Supervisor, in the presence of Dardis telephoned from Florida to the Sports Service Wilmington telephone number OL 6-2501 and obtained the winner of the fifth race at Hialeah at 3:29 P. M. and the winner of the sixth race at 4:00 P. M. The information on the fifth race was obtained within a few minutes of the finish of the race.

Kappel actually waited on the telephone while the race was being run, in spite of the fact that Florida has the aforementioned 30-minute delay law (R. Com., H-105-110).

Edward C. McMahon, an Agent for the Thoroughbred Racing Association Protective Bureau (T. R. A. P. B.), testified as to the great value of flash race results to off-track bettors (R. Com., H-180-84) and to the stringent measures most race tracks have instituted to prevent flash dissemination (R. Com., H-178-79, 212).

In addition to the *personal knowledge* attested to by the witnesses, as outlined in this summary and given in full detail at the hearing, it was the *expert opinion* of *all* the law enforcement officers who testified, that the information disseminated, i.e., the name and number of the official winner of a race, is usable only by bookmakers and professional bettors (R. Com., H-31-32, 44, 45, 48, 52, 59, 124, 125, 131-38, 151-53, 155-56, 377). The T. R. A. P. B. official, another expert, corroborated these opinions (R. Com., H-179-86, 207-08, 216). For this reason flash dissemination of racing information is prohibited by the Code of the T. R. A. P. B. and the Maryland Racing Commission (R. Com., H-218, 472, 482, 485-86, 489, 491). Joseph Tollin, himself, stated this to be the only possible use (R. Com., IX-14).

6. Petitioner's Evidence

The witnesses called by Delaware Sports Service not only failed to rebut the record made by Intervenor, and they not only failed to show any legitimacy to the operation of Delaware Sports Service, but these witnesses themselves fortified the State's position.

The Petitioner's attempt to compare its activities with those of legitimate established radio stations and newspaper media is obviously without merit.[10] There are, of course,

10. The Commission so concluded. Findings and Opinion, R. Com., D-19, pp. 11-19.

many crucial differences and, as one witness testified, such a comparison is unfair (R. Com., H-346). The most important difference, of course, is the speed with which a racing result is brought from the track to the user. The media represented by witnesses in this phase of the Petitioner's case are in the general news business and obtain their income from advertisers, not subscribers to their broadcast services (R. Com., H-344, 426-27, 439, 509). They do not have fictitious subscribers (R. Com., H-345) or subscribers paying them $20 to obtain the result of one race (R. Com., H-345). They obtain their racing information usually by means of the wires of a regular news service, such as the Associated Press, and are not in violation of the law (R. Com., H-343); i.e., they do not employ pitchers and catchers from inside to outside the track (R. Com., H-342, 421-26, 440, 448). They do not give out racing results to telephone callers and in no sense operate a call or flash service (R. Com., H-343-344, 425-26, 437, 452, 507-08, 510). Most importantly, they all testified that there is a considerable time delay between the end of a race and the time of any broadcast they make concerning the race, except for special events (R. Com., H-422, 468-70, 504). In fact, the testimony establishes that elimination of this time lag would violate F. C. C. regulations and policy (R. Com., H-344-45, 427-28, 507-08), which were set up for the specific purpose of preventing the use of flash horse racing results by bookmakers.

Another witness for Petitioner, the Vice President and General Manager of Delaware Park, described the facilities and method of operation used by regular news media to transmit race results out of the track to their offices. A pertinent fact is that the public telephones at the track are not allowed to be used throughout the racing period of the day to prevent their use at that time in transmitting results (R. Com., H-489-91).

Conclusion Regarding Petitioner's "Statement of the Case"

Since the party which is presenting this case to this Court has seen fit not to explain the entire facts which are in the record of the proceedings in the State courts or to discuss the totality of the findings of the Commission and courts whose decisions it questions here, we have found it necessary in the preceding pages to go into perhaps more detail in this connection than is ordinarily required.

REASONS FOR NOT GRANTING THE WRIT

Summary of the Argument

I. Argument as to Due Process of Law

There are factual misstatements and distortions in Petitioner's Brief which must be corrected. For example, there is abundant evidence of sound probative value that Petitioner's business is devoted almost exclusively to the furtherance of illegal gambling on horse races. Some evidence inadmissible under the technical rules of evidence was concededly let into the record at the Hearing before the Public Service Commission of Delaware because that administrative agency is not bound by the technical rules of evidence. Although such commissions are not bound by the technical rules for the sound reason of protecting them from reversible error, their decisions must rest, nevertheless, on a residuum of legal evidence. The cases of *Pennsylvania Publications v. Pennsylvania Public Utility Commission,* 349 Pa. 184, 36 A. 2d 777 (1944), and *Schware v. Board of Bar Examiners,* 353 U. S. 232 (1957), which Petitioner heavily relies on are easily distinguishable from the case at bar in that there was no residuum of legal evidence at all to support their decisions. In the case at bar, all reviewing courts have found much more than enough probative evidence to support the Commission's findings and decisions.

Another factual distortion is Petitioner's contention that he is classifiable with legitimate news media. The crucial differences are set forth fully in our Statement of the Case and in our Argument and need not be summarized here. Similarly, the other erroneous contentions of Petitioner as to the facts of this case are also met therein.

As established in many cases on the discontinuance of telephone service, the standard of proof to be met is that the telephone company need have only "reasonable grounds," "probable cause," "preponderance of the evidence," etc., that Petitioner was furthering illegal gambling in order for the telephone company to be justified in moving to shut off Petitioner's telephones. The "proof beyond a reasonable doubt" required in criminal cases is not necessary in this case, a civil proceeding. This Court has already upheld the validity and constitutionality of a statutory provision in this respect, 18 U. S. C. § 1084(d), in the recent case of *Telephone News System, Inc. v. Illinois Bell Telephone Co.*, 210 F. Supp. 471 (D. C. N. D. Ill., E. D., 1962), 220 F. Supp. 621 (D. C. N. D. Ill., E. D., 1963), *aff'd. per cur.* 376 U. S. 782 (1964). The *Telephone News System* case is a clear guide to the denial of this Petition for a writ of certiorari.

II. Argument as to Freedom of Speech and Press

It is found necessary, again, under this section of the Argument to refute certain erroneous contentions of Petitioner as to the facts. These are set forth in the Argument and need not be specifically mentioned in this Summary.

The police power of a State to regulate telephone service so as to suppress the furtherance of illegal gambling by means of "flash" results of horse races is well recognized. A State statute aimed at suppressing such "flash" results and illegal gambling was upheld as not violative of free speech and press in the *Telephone News System* case, *supra*. There are also many cases from State courts wherein this police power of a State is upheld.

The Delaware statute, 11 *Del. C.* § 674, making it a crime to further illegal gambling by means of private wires or a call service was likewise held constitutional by the Superior Court of the State of Delaware.

I. Argument as to Due Process of Law

A. Refutation of Certain of Petitioner's Assertions

At the beginning of his argument for the granting of the writ (PB-16) as well as at other places in his Petition, the Petitioner makes inadvertent factual misstatements and distortions which must be corrected. In the first sentence, it is contended that this case concerns the efforts of the State of Delaware to bar Petitioner from what he classifies as a completely lawful and proper business. He contends that he has a right to engage in this business and that he is being deprived of his right by court decisions lacking a rational evidentiary basis in violation of the Due Process clause of the Fourteenth Amendment.

It is manifest that the State of Delaware has requested the Diamond State Telephone Company to discontinue service to Petitioner because Petitioner's business is devoted to furthering illegal gambling. The record is replete with evidence of sound probative value that Petitioner's flash service giving out almost instantaneously the unofficial first-place winners of horse races is designed almost exclusively for the use of illegal bookmakers and is tailored to minimize its chances of being held guilty of a crime. No one is so naive as to believe that Petitioner's enormous business is based on anything other than illegal bookmaking. He has not introduced a single shred of evidence refuting or counteracting any of the facts established by Respondents. The only basis for Petitioner's contention that his business is lawful is that he has not been convicted for violation of a criminal law; all of the lower court actions have been civil proceedings. Nevertheless, the evidence in this case has been classified by every court that has studied the record as being more than sufficient to meet the evidentiary standards required in civil actions. We rely on and respectfully refer the Court to our "Statement of the Case," the sum-

maries of facts given in the Opinions of the Public Service Commission (PB-21a-31a) and the Superior Court (PB-10a-15a), and the entire record itself.

Petitioner's hit-and-run tactic of quoting (PB-64a-78a) snatches of the record out of context and in some instances from testimony concededly inadmissible under formal rules of evidence is meaningless. Petitioner seizes (PB-23) on the mere fact that some formally inadmissible evidence entered the record to characterize the entire record as "almost wholly . . . opinion evidence, hearsay and other inadmissible evidence," "lacking in a rational evidentiary basis," etc. Nothing could be further from the truth. At the hearing before the Public Service Commission, it was recognized that a certain amount of normally inadmissible evidence was admitted because of Title 26 *Del. C.* § 183, which provides that "the Commission shall not be bound by the technical rules of evidence." The rule is standard and a sound one for commissions because it recognizes that members of administrative agencies are not experts on the technical rules of evidence and protects them from reversible error. Nevertheless, such commissions must base their decisions on a residuum of legal evidence irrespective of how much inadmissible evidence enters the record. *Geegan v. Unemployment Compensation Commission,* 6 Terry 513, 76 A. 2d 116 (Sup. Ct. 1950); *U. S. ex rel. Dong Wing Ott v. Shaughnessy,* 116 F. Supp. 745 (D. C. S. D. N. Y. 1953). In the case at bar, the Commission pointedly ignored what it considered to be inadmissible evidence and based its findings and holdings on admissible competent evidence. The reviewing courts so held on appeal.

It was a lack of any evidence at all that distinguishes the main cases cited by Petitioner in the first section of his argument from the case at bar. Petitioner's own quotation (PB-19-21) from *Pennsylvania Publications, Inc. v. Pennsylvania Public Utility Commission,* 349 Pa. 184, 36 A. 2d 777 (1944), contains the reason why this case serves him no purpose here. As the court there stated in the passages

quoted by Petitioner, "the record here is entirely barren of anything . . .". And "here there is absolutely no evidence to indicate that appellant was engaged in an unlawful enterprise" (36 A. 2d 779-780). It is illustrative, however, that Petitioner has omitted in his quotations from the *Pennsylvania Publications* case, *supra*, the most pertinent language, which reads as follows:

> "*Fogarty v. Southern Bell Telephone & Telegraph Co.*, D. C. E. D. La., 34 F. Supp. 251 and *Hamilton v. Western Union Telegraph Co.*, D. C. N. D. Ohio, E. D. 34 F. Supp. 928, cited and relied upon by appellee [Pennsylvania Public Utility Commission], are readily distinguishable on their facts from the instant case. *In both those cases there was ample evidence to support the utilities' contention that they had reasonable grounds to suspect the illegality of the subscribers' business. Here there is absolutely no evidence to indicate that appellant was engaged in an unlawful enterprise.*" (36 A. 2d 777 at 780. Emphasis added.)

In the case at bar, there is abundant evidence, as well as a legislative history, to provide a basis on which "to suspect the illegality" of Petitioner's business, and *Pennsylvania Publications* is, therefore, clearly distinguished. It should be noted further that the latter case is not a recent one and may be characterized as one with an unusually naive view of modern illegal gambling on horse races.

Petitioner's reliance (PB-17) on *Schware v. Board of Bar Examiners*, 353 U. S. 232 (1957), is similarly misplaced. The Court there also held that there was no factual basis whatsoever for the conclusion of the Board that the applicant failed to meet the Board's admission standards. Thus, *Schware* is also distinguished from the case at bar.

In a similar vein, Petitioner asserts (PB-17) that the decisions below rest "entirely upon the rationale that if the recipient of information could use it for a purpose prohibited by law, the bare communication of that information

. . . may be prohibited . . .". This assertion flies in the face of the record and the reasoning of the courts below and is a misstatement of the facts. There is likewise no merit to Petitioner's remarkable contention (PB-18) that the flash dissemination of the unofficial winner of a horse race is of no value to bookmakers.

Petitioner's reference (PB-18, 21) to criminal conspiracy leads one to suspect that he is preparing again to argue the case of *United States v. Falcone, et al.*, 109 F. 2d 579 (2d Cir. 1940), aff'd. 311 U. S. 205 (1940). This case, a criminal action for conspiracy against suppliers of sugar to bootleggers, is a situation completely unrelated to the case at bar. In any event, the court there made the following pertinent statement:

> "There are indeed instances of criminal liability of the same kind [as civil liability], where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive." (109 F. 2d 579 at 581)

Judge Hand further conceded that his view that the "conspirator" or "abettor" must be a co-promoter to be guilty of conspiracy was not accepted in other Federal circuits.

Petitioner asserts (PB-17) that he does no more than legitimate news media. It is, of course, extremely infrequent that radio and television stations give instantaneous or rapid transmission of a specially featured horse race. Indeed, they are normally concerned that transmission is not rapid so as to violate F. C. C. regulations and policy. It is not true, as Petitioner maintains (PB-17), that the racing information involved here is transmitted "with impunity" by legitimate media. Petitioner's own witness at the hearing before the Delaware Public Service Commission, Mr. Bryan Field, Vice-President and General Manager of Delaware Park, testified (R. Com., H-489-91)

that even public telephones inside the race track are kept locked and out of use while races are being run so as to prevent their use in rapid transmission of race results. The differences between Petitioner's business and legitimate news media are obvious.

The evidence as to the crucial differences between Petitioner's activities and legitimate established brokerage houses, television and radio stations, race tracks and newspaper media have been set forth in this Brief and in the Commission's Opinion, dated September 12, 1962 (R. Com., D-19, pp. 11-19) as well as in numerous other places in the record, and need not be repeated here. The courts have uniformly recognized these differences. See, for example, *Howard Sports Daily, Inc. v. Weller*, 179 Md. 355, 18 A. 2d 210 (Ct. of Appeals, 1941); *McInerney v. Ervin*, — Fla. —, 46 So. 2d 458 (Supreme Ct. 1950); *Paterson Publishing Co. v. New Jersey Bell Telephone Co.*, 21 N. J. 460, 122 A. 2d 599, 602 (Supreme Ct. 1956); *Taglianetti v. New England Tel. & Tel. Co.*, 81 R. I. 351, 103 A. 2d 67 (Supreme Ct. 1954); *Rubin v. Pennsylvania Public Utility Commission*, 197 Pa. Super. 157, 177 A. 2d 128 (Superior Ct. 1962).

In *Sports News Service, Inc. v. Chesapeake & Potomac Tel. Co.*, 25 P. U. R. 3d 106 (D. C. 1958), the District of Columbia Public Utilities Commission [11] made the following conclusions based upon extensive findings of fact:

> "The commission having made the foregoing findings upon the evidence of record, concludes:
>
> "1. Obtaining race results and furnishing them as an essential service to professional gamblers and bookmakers is calculated to aid or abet gambling and bookmaking.
>
> 2. Gambling and bookmaking, and aiding and abetting a gambler or bookmaker are criminal offenses in the District of Columbia.

11. See Joseph Tollin's testimony before this Commission. JTDC 249-272.

3. Fast race results through wire services are subscribed to, and needed by, illegal, off-track gamblers and bookmakers in their operations.

4. 'Fast', 'immediate', or 'flash' results of horse races are not generally obtainable through legitimate, authorized news channels.

5. Petitioner's plan of operation, to service subscribers throughout the United States and Canada with fast results of horse races via the telephone, has the essential attributes and is patterned after the operation of Delaware Sports Service in every material respect.

6. Delaware Sports Service caters exclusively to professional gamblers and bookmakers throughout the country by furnishing to its subscribers, for a substantial fee, flash results of horse races as fast as the races are run.

7. The cost of service, such as Delaware Sports Service furnishes, and which Petitioner proposes to furnish, would be prohibitive for persons other than professional gamblers or bookmakers.

8. Petitioner's proposed plan of disseminating fast horse race information throughout the United States and Canada by telephone is inherently geared to the needs of illegal gambling and bookmaking.

9. Subscribers to petitioner's proposed news dissemination service would be composed primarily of bookmakers and professional gamblers, the only type of clientele needing and able to afford, this type of service.

10. There is no evidence of record upon which this commission can reasonably find that there is a legitimate public need for, or public interest in, the proposed service.

11. There is no evidence of record upon which this commission can predicate a finding that the petitioner has been discriminated against.

12. Petitioner's proposed service is designed to and would be used in violation of law.

13. In refusing the service requested by petitioner, respondent acted reasonably and in compliance with its published tariff, heretofore approved by this commission." (25 P. U. R. 3d 106, 112-113)

It is the criminal nature of the case, as well as the non-existence of a statute like 11 *Del. C.* § 674, that makes Petitioner's heavy reliance on *People v. Pollack,* 204 Misc. 64, 120 N. Y. S. 2d 363 (1953) inappropriate. In *Pollack,* the defendants were prosecuted in a criminal action under certain state criminal statutes for conspiracy, policy, bookmaking, and contriving a lottery. They were not prosecuted for furthering illegal gambling although it was recognized by the court that, in fact, this was what the defendants were doing in operating their pitcher-catcher system from the race track to a nearby telephone connected to the Delaware Wired Music Company [the predecessor of Delaware Sports Service] in Delaware, 120 N. Y. S. 2d 363 at 365. As the court said, at 364: ". . . the whole question boils down to whether a scheme used by these defendants contravenes existing criminal statutes in this State [New York]." It was found, of course, that the pitcher-catcher scheme in and of itself did not violate the particular New York statutes involved. It was with reluctance, at 369, that the court reached this decision because it was obviously convinced, at 365, 368-369, that the defendants were primarily furthering illegal gambling. The decision on the narrow question faced in *Pollack* is not, therefore, in any way pertinent to the case at bar. This Court can recognize *Pollack,* however, as an early factual authority on the nature of Petitioner's business.

B. Legal Posture of the Case.

Any question of burden of proof is actually moot because the Attorney General of Delaware, without conceding any duty to do so, went forward with the evidence. Findings and Opinion of Commission, dated September 12, 1962 (R. Com., D-19, pp. 2-4; P. App.-19a-21a). The Commission agreed with the Attorney General's contention and gave the petitioner the privilege of merely conducting his case as if in rebuttal (R. Com., D-19, pp. 15-16; P. App.-29a). Sufficient evidence was found in the record to justify the Telephone Company in its contemplated withdrawal of service. The rebuttal was found unconvincing.

The Vice Chancellor of Delaware had held that, to the extent that 11 *Del. C.* § 675 purported to authorize the Telephone Company to discontinue service upon notice by the Attorney General without opportunity for a hearing, it was invalid. A hearing was held. There is nothing in the Vice Chancellor's opinion which holds that action pursuant to § 675 is invalid if a hearing is held. Whether the authority for removal of the telephones is pursuant to § 675 after hearing, or pursuant to § 674, or pursuant to Tariff No. 20, or as a result of the jurisdiction of the Commission not to permit utilities to continue service used to violate public policy (See Findings and Opinion of Commission dated December 14, 1961, R. Com., D-12, pp. 30-34), the fact remains that Petitioner Delaware Sports Service has had an eminently fair hearing. Not only has it failed to show the legitimacy of its enterprise, which it was required to do, it failed to meet and rebut the evidence presented against it to the satisfaction of the Commission as fact-finders, to the Superior and Supreme Courts on review, and, we respectfully submit, to this Court on consideration of the Petition for a writ of certiorari. Certainly any suggestion by Petitioner that the findings of the Commission were against the weight of the evidence would be without merit. *Application of Diamond State Telephone*

Co., 49 Del. 203, 113 A. 2d 437 (Sup. Ct. 1955); cf. *In re Delaware Power & Light Co.*, 48 Del. 149, 99 A. 2d 270 (Super. Ct. 1953); cf. 4 Davis, *Administrative Law* § 29.11. If the proper weight is given to the findings of the Commission, which had an opportunity to observe the demeanor of the witnesses, etc., the result is inevitable. *Application of Diamond State Telephone Co.*, 51 Del. 525, 149 A. 2d 324 (Sup. Ct. 1959).

Since the ultimate risk of non-persuasion rests at all times at the door of one who demands affirmative action somewhat in the nature of an injunction—here, Delaware Sports Service—the failure of proof must be laid at the doorstep of Delaware Sports Service. In such cases the burden of proof is not on the State or the utility. *So. Bell T. & T. Co. v. Nineteen Hundred One Collins Corp.*, 83 So. 2d 865 at 869 (Fla. S. Ct. En Banc 1956); IX Wigmore, *Evidence* (3d Ed., 1940) §§ 2485, 2487, pp. 274-279.

All that the Telephone Company had to show is that it had an honest doubt as to the legality of the use of its service by Petitioner. In *Hamilton v. Western Union Telegraph Co.*, 34 F. Supp. 928 (D. C. N. D. Ohio, 1940), the rule is stated:

> "A court of equity will not restrain the discontinuance of service by a utility if the character of the use of the service is such as to justify an *honest doubt* as to its legality." (Emphasis supplied.)

In *Tracy v. So. Bell T. & T. Co.*, 37 F. Supp. 829, 830 (D. C. S. D. Fla., 1940), the rule is stated thus:

> "* * * Plaintiffs cannot invoke the processes of a court of equity to restrain defendants from discontinuing a public service which the telephone company had *probable cause* or *reasonable grounds* to believe is being used in the maintenance and conduct of such illegal or immoral enterprise." (Emphasis supplied.)

There are numerous authorities supporting utilties in the discontinuance of service on facts much less compelling

than the unchallenged facts of this case. We shall refer to but a few of them.

In *Tagianetti v. New England T. & T. Co.*, 81 R. I. 351, 103 A. 2d 67 (Sup. Ct. 1954), on this same issue the Rhode Island Supreme Court said:

> "On the contrary it has been held that where a public utility's published tariffs 'contain a provision preventing lessees of its wires from using its service to violate, directly or indirectly, any federal or state law,' the court will not by injunction aid one whom the utility justifiably believes is illegally using its service. *Hamilton v. Western Union Telegraph Co.*, 34 F. Supp. 928, 929. Moreover in that case the court said: 'Even without such provision in the tariffs, the defendant would not only be authorized, it would be obligated, to discontinue service which contributes to and facilitates the operation of a business or enterprise in violation of law. Any person or company that knowingly assists in a scheme to violate the law is subject to prosecution. A court of equity will not restrain the discontinuance of service by a utility if the character of the use of the service is such as to justify an honest doubt as to its legality. The service which a person has the right to demand of a public utility is service lawful in character.' There is no intimation in the opinion in that case that the company is bound to refrain from discontinuing service before first giving the user notice of the charge against him and an opportunity to be heard thereon."

To the same effect see *McBride v. Western Union Telegraph Co.*, 171 F. 2d 1 (9th Cir. 1948); *Hagerty v. So. Bell T. & T. Co.*, 59 F. Supp. 107 (D. C. S. D. Fla. 1945); *Hagerty v. So. Bell T. & T. Co.*, 145 Fla. 51, 199 So. 570 (Sup. Ct. 1940); *Fogarty v. So. Bell T. & T. Co.*, 34 F. Supp. 251 (D. C. E. D. La. 1940); *Shillitani v. Valentine*, 296 N. Y. 161, 71 N. E. 2d 450 (Ct. of A. 1947); *Matter of*

Movie Time, Inc., 277 App. Div. 1057, 101 N. Y. S. 2d 71 (S. Ct. 1950); *Tela-News Flash, Inc. v. Dist. Atty. of Queens County*, 96 N. Y. S. 2d 338 (S. Ct. 1950), aff'd. 101 N. Y. S. 2d 245 (S. Ct. App. Div. 1950); *Rosenthal v. N. Y. Tel. Co.*, 141 N. Y. S. 2d 459 (S. Ct. 1955).

In *Rosner and Buckeye Wire Corp. v. N. Y. Tel. Co.*, 205 N. Y. S. 2d 476 (S. Ct. 1960), the court stated that if an illegal use is substantiated the subscriber must show a clear right to restoration of service. In upholding a refusal of service, the court gave great weight to petitioner's failure to refute the evidence of an illegal use, as is the case presented by the record before the Commission, and to petitioner's failure to produce evidence of the legitimacy of the use, as in the case before the Commission. See also *So. Bell T. & T. Co. v. Nineteen Hundred One Collins Corp.*, 83 So. 2d 865 (Fla. S. Ct. En Banc 1956).

In *Paterson Publishing Co. v. N. J. Bell Tel. Co.*, 21 N. J. 460, 122 A. 2d 599, 602 (Sup. Ct. 1956), a similar case in which the court relied heavily upon the testimony of the same representative of the Thoroughbred Racing Association Protective Bureau who testified in this matter before the Commission, the New Jersey Supreme Court said:

> "Where a telephone company knows or has sufficient reason to know that its services are being used in aid of bookmaking it has the right (and indeed the duty) to discontinue them."

The court placed considerable reliance upon the decisions cited in this section of our Brief. The court stated that it would not upset the ruling of the New Jersey Board of Public Utility Commissioners which refused to restore service, in the absence of an affirmative showing by the petitioner that it was unreasonable, arbitrary or capricious.

In the recent case of *Rubin v. Pa. Public Utility Commission*, 197 Pa. Super. 157, 177 A. 2d 128 (1962) the court held that a utility has not only the right but a duty to

refuse to render service being used for a criminal purpose and that the test of the telephone company's refusal is whether there is evidence to support the contention that the utility had reasonable grounds to believe that the service *would be* used illegally. In that case, again, the court relied heavily upon the decisions cited.

Apparently hearsay testimony is barred before the New Jersey and Pennsylvania Public Utility Commissions and apparently the contention was not made that official police records duly authenticated are admissible. Even so, the Pennsylvania court sustained the use of these reports and their admissibility for *the purpose of showing what information the utility and the police had before them in judging whether or not refusal of the service was reasonable.* The court stressed petitioner's failure to refute the evidence of the illegitimate use and petitioner's lack of credibility, as in the case at bar.

Regardless of the question of who has the burden of going forward with evidence and regardless of the question of the legal right of a utility to revoke telephone service without a hearing, the fact remains that the Attorney General did go forward with the evidence and that there was a hearing. The test is whether or not, based upon what facts are available, there was an honest, bona fide doubt that Petitioner's service was being used predominantly for gambling purposes or in furtherance of illegal gambling. The standard is the same, at least within the context of this case, whether the standard is denominated "reasonable grounds," "probable cause," "preponderance of the evidence," etc. *Hamilton v. Western Union Telegraph Co.,* 34 F. Supp. 928 (D. C. N. D. Ohio 1940); *Martinelli v. New York Tel. Co.,* 205 Misc. 503, 129 N. Y. S. 2d 411 (Sup. Ct. 1954) (advice of law enforcement agencies is material on the question of good faith and reasonableness); *Tela-News Flash, Inc. v. District Attorney of Queens County,* 96 N. Y. S. 2d 338 (S. Ct. 1950), aff'd. 101 N. Y. S. 2d 245 (S. Ct. App. Div. 1950); *Tracy v. Southern Bell*

T. & T. Co., 37 F. Supp. 829 (D. C. S. D. Fla. 1940); *Taglianetti v. New England T. & T. Co.*, 81 R. I. 351, 103 A. 2d 67 (Sup. Ct. 1954); *Paterson Publishing Co. v. New Jersey Bell Telephone Co.*, 21 N. J. 460, 122 A. 2d 599 (Sup. Ct. 1956). Those seeking termination of telephone service are not to be held to the absurd standard of proof beyond a reasonable doubt.[12] Such a standard would be required only on a criminal charge and the disposition of any related criminal prosecutions would have no bearing on the narrow issue here before the Court. *McBride v. Western Union Tel. Co.*, 171 F. 2d 1 (9th Cir. 1948); *Taglianetti v. New England Tel. & Tel. Co.*, 81 R. I. 351, 103 A. 2d 67 (Sup. Ct. 1954); *Lipton v. New York Tel. Co.*, 125 N. Y. S. 2d 251 (Sup. Ct. 1953). There is no merit to Petitioner's inferences that the case at bar is a criminal case by his unqualified use of criminal cases, e.g., *People v. Pollack*, 204 Misc. 64, 120 N. Y. S. 2d 363 (1953).

It is important to note that *Telephone News System, Inc., v. Illinois Bell Telephone Co.*, 210 F. Supp. 471 (D. C. N. D. Ill., E. D., 1962), 220 F. Supp. 621 (D. C. N. D. Ill., E. D., 1963), aff'd. *per cur.* 376 U. S. 782 (1964), is not inapposite here as Petitioner would lead this Court to believe (PB-19, Footnote 42). The fact that the business involved in that case transmitted the names of the first, second, and third winning horses in any given race and the price or odds paid for a bet placed on the winning horse, whereas Petitioner here reports the name and number of only the horse finishing first is a minor, insubstantial factual difference, as attested to by expert witnesses and all the other evidence. The legal principles set forth there are clearly pertinent, and it is worthwhile to explore this case in depth.

12. Albert Tollin, in a moment most protective for his clientele, suggested to the McClellan Committee that he would discontinue service to any of his customers who could be "conclusively proved" to be using his service for gambling purposes (R. Com., PX-3, p. 338). This suggestion is amplified in Petitioner's "Statement of the Case" (PB-8).

In the 1962 case, originated by a letter of April 25, 1962, from the United States Department of Justice to Illinois Bell requesting discontinuance of service to Telephone News System, a one-judge Federal court determined that the News System's service violated the Illinois statute, § 28-1 (a)(10) of the Illinois Criminal Code of 1961. This statute provides that a person engages in illegal gambling when he knowingly transmits information as to wagers, betting odds or changes in betting odds by telephones or similar means. The court concluded that plaintiff violated this statute by playing a recording to anyone who dialed a widely advertised telephone number giving the names of the horses finishing first, second and third and the mutuel price paid by the winner, even though this information was obtained from United Press International Service at least twelve minutes after the finish of the race. A finding of fact was that the information was obtained by plaintiff from twelve to thirty minutes after the finish of the race and that, furthermore, an average of five or ten minutes of additional time necessarily elapsed before the received information could be recorded and transmitted to persons dialing the plaintiff's telephone number. Plaintiff did not receive any payment from those dialing in but relied solely on a $600.00 per week payment from Illinois Sports News for spot advertising commercials. While the Government did provide one bookmaker who admitted using the service, it is obvious from the court's opinion that it relied heavily on the facts that Plaintiff gave no credible legal use for its service, going out over 70 telephone lines, and that no one placing a legal bet at a race track would have any need to resort to Plaintiff's facilities. Parenthetically, it should be noted that in the case at bar the information can be flashed instantaneously to customers; Petitioner's telephone number is not widely advertised; he is paid by those receiving the information; all expert witnesses testified to the effect that Petitioner serves primarily bookmakers; there is a signed statement by both Tollins admitting this fact; and there is no other logical explanation

for his vast annual business. The court in the 1962 case then went on to find that Plaintiff was not violating 18 *U. S. C.* § 1084(a) simply because that statute deals only with persons "engaged in the business of betting or wagering," an activity that Plaintiff concededly was not engaging in. The court next found that Plaintiff's activities were in the ambit of § 1084(d), which provides that a common carrier, subject to the jurisdiction of the F. C. C. must shut off service, after reasonable notice, to any subscriber where the carrier has been notified by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that the subscriber is or will be using the facility or service for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State, or local law. It is also provided in § 1084(d) that it does not prejudice the right of a person affected to seek a hearing to secure a determination that the service should not be discontinued. Since § 1084(d) had never previously been considered by a Federal court, the court in this 1962 decision decided that a three-judge District Court should be convened to pass on the constitutionality of § 1084(d). This led, of course, to the 1963 decision.

In the 1963 case, the three-judge court in a lengthy opinion upheld the constitutionality of both § 1084(d) and the Illinois statute. In doing so, the court, among other things, completely refuted the argument often made by Petitioner here that everything is gambling information. The court made the point that whether or not the transmission of particular information is a crime under given circumstances is to be determined not by reference to the term "gambling information" in § 1084(d) but by reference to Federal, State, and local criminal laws which proscribe the sending of gambling information over wire communication facilities (220 F. Supp. 621 at 625). In the case at bar, it is 11 *Del. C.* § 674 and public policy, the Delaware *Constitution*, Art. II, § 17, and 11 *Del. C.* §§ 671

et seq., that prohibit the furtherance of illegal gambling. It was the finding of the Public Service Commission that Petitioner has been furthering illegal gambling, and it would be the dictate of § 1084(d), if applicable to the case at bar and it is not, and case law that Petitioner's service be discontinued. The court made the further point that the shutting off of service is not punitive or penal in character but is preventive and regulatory. The whole argument that Petitioner makes wherein he claims that he is being deprived of his life blood property right without having been found guilty of violating a law is completely exploded by the Illinois District Court in the 1963 opinion. The whole purpose of legislation such as 18 *U. S. C.* § 1084(d) and 11 *Del. C.* § 674, of tariffs such as the one involved in the case at bar, and of the public policy of not condoning or aiding illegal activities is to regulate telephone service so as to suppress illegal gambling. Petitioner's loss of service is incidental to the main object. In the case at bar, the shutting off of telephone service is not an additional penalty for violating § 674, but it is a sanction to prevent the continued transmission of extremely useful information to bookmakers and thereby hamper and hopefully prevent their activities. The court also mentioned a variety of other reasons why § 1084(d) is not penal in character.

Since this Court has affirmed the decision in the 1963 opinion, it stands as a clear and authoritative guide to the denial of this Petition for a writ of certiorari.

C. There Was Sufficient Admissible Evidence Before the Commission to Support Its Findings, Opinion and Order

A main thrust of Petitioner's Due Process argument is an objection to certain evidence. Our position is that the findings of the Commission are supported and are properly within the framework of the legal posture of the case. With respect to the evidentiary questions raised by Petitioner, our answer is as follows: (1) The Commission dis-

regarded much of the evidence attacked by Petitioner; (2) In any event, the Commission was not bound by rules of evidence and could have considered evidence which it, out of an abundance of fairness to Petitioner, did not consider; (3) Petitioner is in error in his attack on certain evidence;[13] (4) There is abundant evidence in any event; and (5) The Delaware Superior and Supreme Courts so held on review. We have already mentioned the fact that the Commission did not consider certain testimony, much of which is attacked in the Appendix to Petitioner's Brief. There is no need to belabor this issue further.

Furthermore, the Commission did not have to take this action. It could have considered formally inadmissible evidence in addition to admissible evidence under 26 *Del. C.* § 183 which permits it to conduct hearings without being "bound by the technical rules of evidence." Surely the Delaware legislature did not intend by this invitation that there would be "built-in" error on appeals which it also provided for in the same statute. 26 *Del. C.* § 192; 48 *Del. Laws,* Ch. 371, §§ 3, 19 (1951). The only limitation is that which was set forth in *Geegan v. Unemployment Compensation Commission,* 6 Terry 513, 76 A. 2d 116 (Sup. Ct. 1950). See also *National Labor Relations Board v. Columbian Enameling & Stamping Co.,* 306 U. S. 292 (1939) and *Schware v. Board of Bar Examiners,* 353 U. S. 232 (1957). The limitation is that a finding may not be based exclusively

13. For example, with respect to Detective Wassmer's testimony, the record refutes Petitioner's sweeping inference in the Appendix of his Brief that all of his testimony was based on hearsay. Nor was there a violation of 11 *Del. C.* § 757 by Wassmer. That statute proscribes disclosure of "any dispatch or message, communication or report intended for another." Wassmer merely testified to a compilation of data, called a toll analysis, of official records kept in the ordinary course of business of the telephone company showing telephone numbers which had been in telephone contact with Delaware Sports Service. Similarly, the information from police officials of New Jersey, Pennsylvania, and Washington, D. C., was verified by personal visits of Wassmer. Further, the Commission did not accept "similar information from persons who did not testify under oath before this Commission" (R. Com., D-19, p. 11).

on incompetent evidence. Such is obviously not the case here.

We have already discussed the evidence in considerable detail and no useful purpose would be served by repeating it here. Suffice it to say that there is clearly sufficient competent evidence. (a) The uncontradicted facts of the nature of business (speed, "pitchers-catchers," fictitious names, high prices, etc.) coupled with *expert* opinion that this business can only be used for aiding bookmakers and professional bettors for purposes of past-posting, bet stimulation, lay-offs, etc.,[14] is sufficient in and of itself to support the findings. *Tela-News Flash, Inc. v. District Attorney of Queens County,* 96 N. Y. S. 2d 338 (S. Ct. 1950), aff'd. 101 N. Y. S. 2d 245 (S. Ct. App. Div. 1950); *Paterson Publishing Company*[15] *v. New Jersey Bell Telephone Co.,* 21 N. J. 460, 122 A. 2d 599 (Sup. Ct. 1956). (b) Absurdity is approached when "lack of evidence" is asserted, when there is added to the foregoing the admission in the statement signed by Albert Tollin (*supra*) and amplified by the statement made by Joseph Tollin before the District of Columbia Public Utilities Commission[16] (*supra*) which Albert ac-

14. Compare the testimony of experts to the effect that knowing the unofficial winner immediately after the race furthers gambling predominantly, with Petitioner's many references in his Brief to his "lawful" business.

15. It is interesting to note that the court in the *Paterson* case found that the company involved there ". . . acquired the information largely by long distance telephone calls to a corporation in Delaware . . ." (122 A. 2d 599 at 601).

16. Petitioner's reference (PB-78a) to the testimony of a dead man is without merit. The testimony of Joseph Tollin before the District of Columbia Public Utilities Commission, Exhibit C to Stipulation of August 10, 1961 (R. Com., D-6) is clearly admissible since Joseph Tollin was the senior partner of Delaware Sports Service, Petitioner here. As such, his statements and declarations, duly authenticated (Stipulation of August 10, 1961, par. 4), are admissible against the partnership as admissions of a partner, whether deceased or not. 6 *Del. C.* § 1511; *Wieder v. Lorenz,* 164 Ore. 10, 99 P. 2d 38 (Sup. Ct. 1940); IV Wigmore, *Evidence* § 1078; *Cf. East Girard Savings & Loan Association v. Honlihan,* 373 Pa. 578, 97 A. 2d 23 (Sup. Ct. 1953). In any event, it would be admissible as a declara-

knowledged was a reference to bookmaking (R. Com., PX-3, p. 312). (c) When other direct, competent evidence is added to the expert interpretation of the uncontroverted evidence and the admissions, the conclusion is irresistible. For instance, the raid on Talent Enterprises was testified to upon personal knowledge;[17] this is also true of raids by other law enforcement officers on other establishments elsewhere;[18] the Commission viewed the premises; toll analyses were testified to by the persons who made them; criminal records of persons in telephone contact with Petitioner were duly authenticated, showing gambling arrests and convictions.

We submit that the entire record, which we respectfully request the Court to consider as completely as possible,

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tion against interest of a witness. V Wigmore, *op. cit. supra*, §§ 1460, 1475; McCormick, *Evidence*, pp. 546-554. Petitioner cannot now be heard to argue that the entity is different now from what it was prior to Joseph Tollin's death. It apparently did not consider it so in filing its petition before the Commission. *Compare* Exhibit A to Stipulation of August 10, 1961, par. 3, see especially page 3, with Court of Chancery Complaint, Exhibit B to Stipulation of August 10, 1961. It did not consider the entity different when it endeavored to make a point that it had offered to terminate its service to persons violating Delaware law (R. Com., H-531-532). Certainly the "Dead man's Statute" (10 *Del. C.* § 4302) is not applicable. *American Security Co. v. Shatterproof Glass Corp.*, 154 F. Supp. 890 (D. Del. 1957), aff'd. 268 F. 2d 769, *cert. den.*, 361 U. S. 902.

17. It is immaterial in this proceeding that the case did not go to trial and was not decided on the merits. What is material is that these officers testified that the Talent Enterprises called Delaware Sports Service, that on the premises they found no evidence of any kind of legitimate business, that they did find horse racing information paraphernalia and that they did find a list of persons who resided in Delaware and who have bookmaking records to the personal knowledge of these officers. They described the premises involved and the description is similar to Petitioner's premises.

18. Note, for example, that Inspector Moynihan's testimony is clearly based on personal knowledge: "I know for a fact personally that some of the telephones in contact with the Delaware Sports Service were in fact being used to accept bets for bookmaking. I personally know that for a fact" (R. Com., H-118-19).

contains sufficient unassailable, direct[19] evidence to measure up to any standard of proof—even proof beyond a reasonable doubt. In fact, even hearsay evidence can be added to this, under 26 *Del. C.* § 183, or even without that statute, as certainly being material to prove to the Commission what *the law enforcement agencies and Diamond State had before them upon which they formed their belief as to the nature of Petitioner's service. Rubin v. Pennsylvania Public Utility Commission,* 197 Pa. Super. 157, 177 A. 2d 128 (1962).

D. Conclusion

It is submitted, therefore, that Petitioner has not been denied due process of law, consistent with the Due Process clause of the Fourteenth Amendment, and further that there are not important and unsettled questions relative to this issue which should be settled by pronouncement of his Court.

II. Argument as to Freedom of Speech and Press

A. Refutation of Certain of Petitioner's Assertions

Petitioner in this section of his Brief relies heavily on the same contentions made in his argument as to Due Process, *i.e.,* that he is operating a business similar to that of legitimate news media. It would be an unnecessary burden on the Court to repeat here the refutation of this contention which is set forth in the foregoing section of

19. Even if the evidence is considered circumstantial (which it is not), every other reasonable hypothesis as to the Petitioner's use of the service has been excluded. The essential issues are established by the testimony of Albert Tollin alone, who could not tell the Commission what use was being made of his service, as well as by the entire record. The fact that Petitioner does not know who its customers are has no effect whatsoever except to strengthen Respondents' case. *Howard Sports Daily, Inc. v. Welker,* 179 Md. 355, 18 A. 2d 210 (Ct. of App. 1941).

this Brief. Suffice it to say here that all the evidence is contrary to Petitioner's contention and he has yet to advance any credible explanation for his enormous annual business except the furthering of illegal gambling on horse racing. Indeed, there is abundant affirmative evidence that he is almost exclusively engaged in furthering illegal gambling.

Petitioner's cases cited at PB-24 are, therefore, almost irrelevant to the issue at hand. Certainly, his quotation from *Thomas v. Collins,* 323 U. S. 516, 530-531 (1945), is in no way contradictory to Respondents' position. There is undoubtedly a clear public interest suffering directly from the continuance of Petitioner's telephone service. *Telephone News System, Inc. v. Illinois Bell Telephone Company, supra,* as well as the many other cases cited in the preceding section of this Brief.

Notwithstanding Petitioner's contention (PB-24-25) to the contrary, this Court has clearly spoken as to whether or not and under what conditions an administrative agency and a telephone company can discontinue telephone service. It affirmed in the *Telephone News System* case the holding of a three-judge Federal District Court that 18 *U. S. C.* § 1084(d) and § 28-1(a)(10) of the Illinois Criminal Code are constitutional. Certainly, the case at bar raises no constitutional questions outside the scope of that decision.

While 18 *U. S. C.* § 1084(d) has not been involved in any of the proceedings before the Delaware courts or Public Service Commission, closely comparable State statutes and public policy as well as the Telephone Company tariff have provided individually separate and sufficient grounds for the actions in the State courts. The statutes and the tariff are set forth in our "Statement of the Case." The public policy against furthering illegal gambling is founded on Article II, § 17, of the *Constitution* of the State of Delaware and the clear legislative intent evidenced in Title 11 *Del. C.* §§ 661 *et seq.,* as well as on comparable constitutional and statutory provisions of other

states. Our reliance on 18 *U. S. C.* § 1084(d) here is only to the extent that it has clearly been held to be constitutional and therefore is solid authority in favor of the constitutionality of the State statutes, the Telephone Company tariff, etc., relied on in the case at bar. We specifically do not introduce § 1084(d) into this Brief as a comment or inference as to jurisdiction, a possible issue which Petitioner has not raised before this Court but one which he is concurrently contesting before the United States District Court for the District of Delaware.

This Respondent respectfully believes that he might end this argument as to freedom of speech here and still have presented a sufficient basis to this Court for denying the Petition for a writ of certiorari. We believe, however, that this would neglect certain possible, though unmeritorious, arguments that Petitioner could have made in his Brief as he has in previous proceedings on this matter. The following sections, therefore, are included here for the purpose of thorough, comprehensive treatment.

B. Applicability and Constitutionality of 11 *Del. C.* § 674

We contend, of course, that § 674, a criminal statute, sets forth an offense which when found in a civil proceeding such as the one at bar, would suffice to cause the discontinuance of Petitioner's telephone service. But § 674 is not the only basis for discontinuance of telephone service. The Telephone Company's tariff is a sufficient basis. The general regulatory supervision to prevent violation of Delaware's public policy is a sufficient basis.

Among the many individual and separate bases for action in this case, therefore, is 11 *Del. C.* § 674. This statute was clearly intended to cover this type of case since it was enacted after the unsuccessful prosecution of Tollin under § 669, quoted *supra*. As provided in § 677, it is an exercise of the police power of the State of Delaware to protect the public welfare, health, peace, safety and morals

of the people. The Petitioner has stipulated (R. Com., D-6, par. 3) that he operates a call service as defined in § 671 and has thereby clearly placed himself within the purview of § 674. Nevertheless, he has previously argued that the proscription against dissemination of "information in furtherance of gambling or for gambling purposes" in § 674 is limited to information prior to an event and information which assists in furthering gambling, wagering on a future. In support of this theory he cited *France v. United States,* 164 U. S. 676 (1897) and *United States v. Bergland,* 209 F. Supp. 547 (D. C. E. D. Wis. 1962). Both of these cases were prosecutions under criminal statutes prohibiting use of interstate facilities in (a) the placement of bets or wagers or to carry on illegal gambling (*Bergland*) or (b) transporting any paper "purporting to be . . . a chance . . . dependent upon the event of a lottery." (*France*) The Courts in those cases held that *those criminal statutes* must be strictly construed in those *criminal prosecutions* and that the statutes did not apply to interstate activity after the race or event was over because the element of chance was missing. Neither of those cases involved prosecution under a statute similar to § 674 against one whose flash business by design is a valuable aid to bookmakers and professional bettors for bet stimulation, lay-offs, past-posting and other purposes. We do not even contend, as was the case in *Bergland,* that the Tollins themselves gathered the flash information from the race track for the purpose of utilizing it themselves to place a "bet" in another city with an unsuspecting bookmaker on a race, the result of which had been determined. If this were a criminal prosecution against Tollin for doing the foregoing under a statute exactly the same as the Federal statute in that case (which is completely dissimilar from § 674) then this Court would have to determine whether or not it wanted to follow *Bergland.* Since the cases are so dissimilar there is no need for us to comment on whether or not *Bergland* is bad law.

Similarly, the case of *Parkes v. Bartlett*, 236 Mich. 460, 210 N. W. 492 (Sup. Ct. 1926) has been a prior focus of attention. In considering the *Parkes* case, it should first be recognized that the statute involved there prohibited, by its very language, both harmful and harmless publications. 11 *Del. C.* § 674 does not contain language which gives the statute such broad application; it is clearly limited to the prohibition of the dissemination or receipt of information in furtherance of gambling or for gambling purposes by means of private wires or by means of a call service. It is also sufficient to say that, since 1926, the importance to bookmakers of horse racing information, both before and after a race, has been recognized by all concerned and is before this Court. It is important to note that, in *Parkes*, one part of the legislation there involved was *held not to violate due process even though summary prohibitions were involved.* It is undoubtedly significant that, in *Parkes*, the statute was applied to regular news media.

Petitioner has also previously referred to two Federal cases decided under the new Federal statutes relating to interstate gambling. *E.g.*, 18 *U. S. C.* § 1084. *Telephone News System, Inc. v. Illinois Bell Telephone Company*, 210 F. Supp. 471 (D. C. N. D. Ill., E. D. 1962); *Kelly v. Illinois Bell Telephone Company*, 210 F. Supp. 456 (D. C. N. D. Ill., E. D., 1962) (R. Super. Ct.-5, pp. 39, 43). Neither of those cases, decided by the same judge on the same day, passed on constitutional questions.

Significantly, the court in the *Telephone News System* case, *supra*, 220 F. Supp. 621, 638-640, considered this same argument as to the definition of gambling. It found there that rapid transmission of race track results was the object of the State legislation and that this object is not an unreasonable exercise of the police power of a State. Clearly, 11 *Del. C.* § 674 with its proscription against dissemination or receipt of information to further gambling by means of private wires or a call service has as its object this same regulation and suppression of flash race results to illegal

gamblers and is not an unreasonable exercise of police power.

It is also most significant that the constitutionality of 11 *Del. C.* § 674 has already been passed upon by a Delaware court. *State v. Michael C. Benicky, et al.*, Criminal Actions Nos. 45-46, 1959, Nos. 96-101, 1960, Superior Court of Delaware, Kent County (Storey, J., unreported opinions dated March 28, 1961, and May 9, 1961). In *Benicky*, Judge Storey upheld the statute as not in violation of freedom of speech and also upheld it against attacks that it is vague and indefinite.

To the same effect as the decision in *Benicky* are the following comments of the Vice-Chancellor of the Delaware Court of Chancery regarding Petitioner's shock at the alleged vast scope of the statute and in rejecting the same arguments that were made in *Benicky:*

> "Plaintiffs profess to be shocked at the allegedly vast scope of the statute under attack, contending that were it valid and to be enforced in a nondiscriminatory manner, it would penalize all persons engaged in giving out information concerning future events such as security and commodity futures and the like, however, I do not believe that the statute as a whole should be so unreasonably read, being of the opinion that it was enacted by the Legislature to deprive those who aid and abet the professional gambler and his clientele by giving flash results on sporting events of an essential tool, namely telephone service." (164 A. 2d 254 at 257)

Other statutes similar to that involved in the case at bar have been held not to violate constitutional provisions protecting freedom of speech. *State v. Western Union Telegraph Company*, 12 N. J. 468, 97 A. 2d 480 (Sup. Ct. 1953); *Howard Sports Daily, Inc. v. Weller*, 179 Md. 355, 18 A. 2d 210 (Ct. of App. 1941); *Southern Bell T. & T. Co. v. State ex rel. Trans-Radio Press Service, Inc.*, 53 So. 2d 863 (Fla. Sup. Ct. En Banc 1951). The question was not even raised in many of the other cases cited in this

Brief and involving similar state action. See also *Dunn v. Nevada Tax Commission*, 67 Nev. 173, 216 P. 2d 985, 993-94 (Sup. Ct. 1950).

Certainly § 674 is within the police power of the State; and no invasion of our liberty, free speech or free press is involved in an effort to permit the Telephone Company to remove its telephone lines and telephones from a principal aider and abettor of illegal gambling.

C. Regulations and Jurisdiction of the Public Service Commission

Petitioner has also previously engaged in what was apparently an attack on the first opinion of the Public Service Commission, dated December 14, 1961, dealing with the question of its jurisdiction of this action (R. Com., D-12; P. App. 35a-63a). It is sufficient to say in answer to such attacks that the Commission had ample authority under its regulations to conduct a hearing and then order a discontinuance of Diamond State's telephone service to Petitioner. The Court is respectfully referred to the opinion of the Commission wherein it considered at great length the question of its jurisdiction in this case. The Commission cited 26 *Del. C.* § 121 (R. Com., D-12, p. 27), 26 *Del. C.* §§ 124, 134 (R. Com., D-12, p. 28), Art. II, § 17, of the Delaware *Constitution* (R. Com., D-12, p. 30), and 11 *Del. C.* §§ 661 *et seq.* (R. Com., D-12, p. 31) as statutory authorities for its decision to accept jurisdiction. The Commission did not rely solely on 11 *Del. C.* §§ 661 *et seq.* nor on Diamond State's tariff, Par. 20, § 1, filed with the Commission (R. Com., D-12, p. 24). The Commission's conclusions are set forth fully (R. Com., D-12, pp. 30-34) and need no further amplification by the State.

D. Tariff of Diamond State Telephone Company

The foregoing discussion under sub-section (B) is applicable here and need not be repeated. In addition, it

cannot be asserted that 11 *Del. C.* § 675 is unconstitutional and hence Paragraph 20 of the Diamond State tariff is invalid. 11 *Del. C.* § 675 may be valid once a hearing has been held as is now the case. In any event, the tariff is valid. *Taglianetti v. New England Tel. & Tel. Co.*, 81 R. I. 351, 103 A. 2d 67 (Sup. Ct. 1954); *Scance v. New Jersey Bell Telephone Co.*, 95 P. U. R. (N. S.) 16 (N. J. P. U. C. 1952).

Petitioner has previously attempted to make much of *Jordan v. Diamond State Telephone Co.*, (Unreported opinion, Court of Chancery of Delaware, C. A. 490, 1954). That case has no relation to the case at bar. In *Jordan*, the Telephone Company attempted to discontinue service without any notice from any law enforcement agency, and without producing any evidence that the telephone was put to an illegal use; the record there was completely barren of such evidence. The court emphasized that the Telephone Company had not been advised by law enforcement officials that an unlawful condition existed and then stated that where there is no such notice there has always been some tangible evidence which, if believed, "would warrant a *reasonable person to conclude* that an unlawful condition existed." The court then concluded that there was no such evidence in that case. In the case at bar, the record is replete with evidence that an unlawful condition exists in Petitioner's business.

Petitioner has also previously referred to *Katz v. American Telephone & Telegraph Co.*, 92 P. U. R. (N. S.) 1 (1951) as authority for the contention that the Telephone Company tariff is unreasonable and unjust. The *Katz* case has no binding force whatsoever; it has been rejected by the subsequent authorities referred to elsewhere herein; furthermore, the Federal Communications Commission there clearly recognized throughout its opinion that, upon proper notice and a hearing, a tariff regulation which forbade the use of service for an unlawful purpose or which would be used for an unlawful purpose would be valid; further, there

was no statute involved in that case similar to 11 *Del. C.* § 674; in addition, in that case, the Federal Communications Commission specifically held that in certain cases service could be discontinued even without notice. In short, all that *Katz* holds is that the particular wording of the regulation involved in that case, considering the circumstances here involved and the absence of a statute like ours, made the regulation unreasonable but that properly worded a tariff provision similar to that involved in the case at bar would be sustained. This analysis is supported by the later decisions herein cited which ignored *Katz*. The *Katz* decision was also questioned in a case comment in *65 Harv. L. Rev. 1255 (1952)*.

Any further reliance by Petitioner upon *Andrews v. Chesapeake & Potomac Tel. Co.*, 83 F. Supp. 966 (D. C. D. C. 1949) would be similarly misplaced. That case was decided in 1949, and, therefore, before most of the other cases mentioned by us herein.[20] In any event, *Andrews* is distinguishable because the court held only that the telephone service could not be cut off merely upon receipt of notice from the U. S. Attorney. The court held that evidence would be considered *even on affidavits*. Furthermore, *Taglianetti v. New England Tel. & Tel. Co.*, 81 R. I. 351, 103 A. 2d 67 (Sup. Ct. 1954), similarly construed the effect of *Andrews*.

E. Public Policy

Diamond State Telephone Company does not have to rely on either statutes, Commission regulations, or the tariff to discontinue service to Petitioner. As set forth in the Superior Court Opinion (R. Super. Ct.-10, pp. 10, 11), a telephone company may take the necessary steps to discontinue its service where it is reasonably satisfied that such service is being utilized by its customer against public

20. As is true of the 1944 case of *Pennsylvania Publications, Inc. v. Pennsylvania Public Utility Corporation*, 349 Pa. 184, 36 A. 2d 777 (1944).

policy, such as in the furtherance of bookmaking, an illegal enterprise in this and other states. *Tracy v. Southern Bell Telephone & Telegraph Co.*, 37 F. Supp. 829 (D. C. S. D. Fla. 1940); see *Taglianetti v. New England Telephone and Telegraph Co.*, 81 R. I. 351, 103 A. 2d 67, 70, 71 (Sup. Ct. 1954). A telephone company may also act to discontinue service where such service is against public policy. *Howard Sports Daily v. Weller*, 179 Md. 355, 18 A. 2d 210 (Ct. of App. 1941); *Hamilton v. Western Union Telegraph Co.*, 34 F. Supp. 928 (D. C. N. D. Ohio 1940); *Rubin v. Pennsylvania Public Utility Commission*, 197 Pa. Super. 157, 177 A. 2d 128 (1962); *Lipton v. New York Tel. Co.*, 125 N. Y. S. 2d 251 (1953).

F. Policing the Public Morals

Petitioner has previously used a quotation from the 1944 case of *Pennsylvania Publications, Inc. v. Pennsylvania Utility Commission*, 349 Pa. 184, 36 A. 2d 777, 781 (1944), made originally in *People v. Brophy*, 49 Cal. App. 2d 15, 33, 120 P. 2d 946, 956 (1942), to argue that the Commission is policing the public morals. These cases do not apply to the case at bar, as has been explained above, and are, in any event, outdated as to their naive view of modern illegal gambling on horse races. Nevertheless, we fully agreed with Petitioner's position that the Public Service Commission and the Telephone Company are not law enforcers nor keepers of the public morals. The Public Service Commission fully agr[illegible] also. Opinion of the Commission, dated December 14, 1961 (R. Com., D-12, pp. 27-28). But the Commission and the Telephone Company have the responsibility not to aid a calculated, brazen, premeditated, extravagant effort to violate the law or public policy by continuing to permit service to organized crime. They have been responsive to this duty.

This argument as to policing the public morals is an example of the tactic of arguing in broader terms than

necessary for the case at bar, as Petitioner also pointedly does in both sections of the argument in his Brief. It is another aspect of the smoke-screen technique. This technique cannot be permitted to obscure the state of the law as represented in the cases cited in our Brief.

G. Conclusion.

It is submitted, therefore, that Petitioner has not been denied the right of Free Speech and Press guaranteed by the First and Fourteenth Amendments and further that the public interest does not require that this Court make further determinations on this issue.

CONCLUSION

It is respectfully submitted that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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